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Understanding the Anti-Trust Laws (Jerrold G. Van Cise)

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one saw its lips move. The modern cynic doesn't even mind if the lips are seen to move as long as the audience likes what it hears. I do not believe the new cynicism is any closer to the truth than the old. Like Holmes' bad man theory of law, it may tell the wilful and lawless how far they may defeat the law's purposes without being called to account, but it gives no guidance to the honest judge who wants to give effect to the Constitution's purposes, not his own.

Of the trend of decision culminating in *Miranda*, some distinguished jurists are in accord with the late Judge John J. Parker, who commented in disbelief: "It is hard for a lawyer to really think . . . that this is the law in this country now — but it is!"³² Since most men, however, have an infinite capacity for accommodating their judgment to the current fashions in belief, it will remain for a later generation of lawyers to evaluate the present body of criminal procedure law. In the meantime I recommend Lord Chesterfield's advice to his son:

The things which happen in our own times, and which we see ourselves, do not surprise us near so much as the things which we read of in times past, though not in the least more extraordinary; . . . when Caligula made his horse a Consul, the people of Rome, at the time, were not greatly surprised at it, having been in some degree prepared for it, by an insensible gradation of extravagancies from the same quarter.³³

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UNDERSTANDING THE ANTITRUST LAWS. By Jerrold G. Van Cise. New York: Practising Law Institute, 1970 Ed. Pp. xii, 363. \$20.00.

What one has done in a book, at least as to substantive content, should be judged by what the author purported to do. Mr. Van Cise tells us that his book is written for the general practitioner, and that

[i]nitially, there will appear in these pages a brief historical review of how our antitrust principles have evolved over the centuries — not in quiet — but in the stream of life. Thereafter, the statutes and cases will be analyzed; the procedures for dealing with them will be described; the application and enforcement of their pro-

³² GRAHAM 109.

³³ Letter from Philip Dormer Stanhope, Fourth Earl of Chesterfield to Philip Stanhope, Sept. 13, 1748, in LORD CHESTERFIELD, *LETTERS TO HIS SON AND OTHERS* 68-69 (Everyman ed. 1929).

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hibitions will be explained; and some recommendations for complying with their commands will be offered.¹

That undertaking has been performed briefly but very well. How briefly can be emphasized by first noting that a case of recent import, *Lear, Inc. v. Adkins*,² with its significant implications for competition, receives the short comment that covenants not to contest the validity of patents have been challenged; also, approximately only one page is devoted to the doctrine of reciprocity as a factor in evaluating the legality of conglomerate mergers and as it is otherwise practiced. At no point, and this is perhaps consistent with the book's plan, does the author linger over the areas of ferment or philosophical challenge in the law of antitrust. He simply seeks to present the state of the law with understanding. One valuable exception, however, is his treatment of the role of the antitrust laws in preserving our capitalistic, free enterprise system, and in promoting industrial, commercial, social and political democracy. Facets of this idea appear at several places and, in their totality, make one of the best statements on the point this reviewer has seen. The reader gets the impression that the author feels this very deeply and correspondingly recognizes that it is one of the most important ideas that counsel can convey to his client.

That the author's task has been done very well, considering its brevity, is equally apparent. He sacrificed lengthy development of the controversial areas of antitrust in order to give to the general practitioner a wide-ranging, basic knowledge of antitrust law, accompanied by an introduction to the sources from which this knowledge could be expanded and refined. It is obvious that the author was able to visualize the plight of the general practitioner who, for the first time, is faced with the necessity of guiding a client through troubled antitrust waters. He then takes the object of his vision step-by-step, from the origins of the ideas that gave rise, both in England and America, to common and statutory antitrust law, to the final acts of preparing a program of compliance for his client, including its implementation and a follow-up to insure its observance. Along the way, he introduces the neophyte to sections of the relevant statutes, the principal court decisions interpreting them, and how each meshes into the totality of the statutory scheme. Finally, he painstakingly tells him how to develop the proper advice to give his client, how to impart and disseminate it to the appropriate operating levels, and how to install procedures to minimize the chances that the businessman, harried by the pressures

¹ J.G. VAN CISE, *UNDERSTANDING THE ANTITRUST LAWS* 1 (1970 ed.).

² 395 U.S. 653 (1969).

of the day, will ignore his advice. These detailed instructions clearly embody the experiences of one who has lived them many more times than has this reviewer, and it seems that it hardly could have been done better.

A few other observations might be of value. First, the approach to advising the businessman appears a bit overcautious. Admittedly, sanctions for violating the antitrust laws can be severe. The ordeal of litigation alone, even when one wins, can be both disruptive and expensive. But dynamic business probably cannot always sail close to shore in calm, completely safe legal waters. There are practices which, of course, should be avoided, but there are many gray, uncertain areas where we can talk only in terms of probabilities or possibilities. Here the chances of conduct being a violation, and the likely sanctions if it is challenged and established to be so, must be discounted by the business value of the action under consideration. If legal advice is to avoid being overcautious by definitely making certain that which is uncertain, it must at times be cast in terms of honestly conceived calculated risks. Lawyers on the whole tend to be conservative. When they advise their clients, their professional reputations are at stake. Perhaps the best professional record for the lawyer could be established by never letting his client make any move entailing a chance of resulting in a violation of the antitrust laws. But in so doing, he might not be the best lawyer for his client or society. The growth of the common law and the development of our statutes has depended in large measure on actions involving some chance.

Furthermore, the author did not always maintain the distinction between what the statutes expressly provide as contrasted with what the courts have added. One instance appears in the discussion of section 1 of the Sherman Act. That section states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal. . . ."³ Expressly and literally the statute is rather dogmatic. It neither expressly speaks of undue or unreasonable restraints of trade nor of those that are violations per se. But in his discussion, the author states that section 1 "on its face" applies only if there is an "undue" restraint of competition. Further it is stated that "[c]ertain contractual restraints are usually condemned out of hand by the language of section 1. . . . Here the courts have little discretion."⁴ In short, the discussion leaves the impression that the language of section 1 makes the distinction

³ 15 U.S.C. § 1 (1964).

⁴ J.G. VAN CISE, *supra* note 1, at 32.

between due and undue restraints of trade and between violations per se and those found to be violations only after a more exhaustive judicial inquiry. We know in fact, however, that the former was determined by the courts only after some 21 years of judicial equivocation, and the latter, in crystallized form, only several years later.

A second instance appears in the author's analysis of section 7 of the Clayton Act, where he claims that such an analysis reveals that section 7 condemns only those acquisitions that "probably" — not possibly — will substantially lessen competition. It is submitted that it would be hard to justify that conclusion by any analysis of section 7. Perhaps the natural reading of the language of section 7 — "where . . . the effect . . . may be substantially to lessen competition"⁵ — is closer to "possibly" will than "probably" will, and the latter interpretation is achieved only by an analysis of the cases as well as the statute. Even then the result is uncertain. In *Utah Pie Co. v. Continental Baking Co.*,⁶ the Supreme Court used both terms, but the existence of a "reasonable possibility" appeared to be the basis of the Court's decision.

These latter observations, even if valid, are of minor significance when viewed against the background of the outstanding quality and value of the book as a whole. While it was written for the general practitioner, anyone interested in our antitrust laws, including businessmen who are subject to them, could benefit by reading it. Such a suggestion to the businessman might very well be a part of the counselor's counseling.

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⁵ 15 U.S.C. § 18 (1964).

⁶ 386 U.S. 685 (1967).

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